No. SCWC-21-0000024

IN THE SUPREME COURT OF THE STATE OF HAWAIʻI

FOR OUR RIGHTS, a Hawaiʻi corporation, *et al.*, Petitioners-Plaintiffs-Appellants, vs. DAVID IGE, in his official capacity as Governor of the State of Hawaiʻi, *et al.*, Respondents-Defendants-Appellees.	CIVIL NO. 5CCV-20-0000091 ICA CAAP-21-0000024 REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE INTERMEDIATE COURT OF APPEALS Hon. Katherine G. Leonard, Presiding Judge, Hon. Sonja M. P. McCullen, Assoc. Judge Hon. Karen T. Nakasone, Assoc. Judge

REPLY TO RESPONDENT'S RESPONSE IN OPPOSITION TO APPLICATION FOR WRIT OF CERTIORARI FROM THE DECISION OF THE INTERMEDIATE COURT OF APPEALS

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Petitioners For Our Rights, *et. al* ("Petitioners"), by counsel, submit this Reply to Respondent's Response In Opposition To Application For Writ Of Certiorari From The Decision Of The Intermediate Court Of Appeals (cited as "Resp.") in the above-captioned matter.

ARGUMENT

I. Nondelegation And Separation of Powers Points Were Appropriately Raised And Briefed To The Circuit Court, And Thereafter Were Preserved For Review.

Attempting to short-circuit the analysis before this Court, Respondents contend Petitioners have not sufficiently preserved their arguments concerning the doctrines of separation of powers and non-delegation. Resp. Br. at 7, 8. The assertion is false: Petitioners argued both of these doctrines at great length before the circuit court in response to Respondent's arguments. *See* ICA Dkt. 50, Memo. in Opp. to Mot. to Dismiss; *see also* Dkt. 6, Am. Cplt, §§ 34-40 (alleging statutorily and constitutionally limited executive powers of Governor).

Respondents' Motion to Dismiss contended the Governor can unilaterally declare an "emergency" and exercise near unlimited power over the state and its people indefinitely. ICA Dkt. 26, Mot. at 9-11. To counter Respondents' view means showing why it is wrong. Petitioner's Opposition brief appropriately showed Respondents' legal position runs afoul of the doctrines of non-delegation and separation of powers. *See* ICA DKT 50 at 8-10 (non-delegation doctrine), 9-14 (non-delegation doctrine and separation of powers. To the trial court, Petitioners summarized:

> Defendants here advocate interpreting HRS chap. 127A in a way that violates both the separation of powers and nondelegation doctrines. Accepting Defendants' view - that the governor is empowered to virtually run the entire state for an unlimited period - would contradict long settled constitutional principles.

Id. at 14.

Moreover, Respondents did not assert any such "failure to raise" argument in the trial court. Quite the contrary: Respondents raised no objection in reply but instead argued the non-delegation/separation of powers points of law on their merits. ICA Dkt. 55, pp. 5-7 (including lengthy footnotes). The circuit court received from both parties the constitutional doctrine arguments in the first instance after Respondents claimed the Governor's power could be extended indefinitely by mere successive extensions and proclamations. Both parties briefed the issues to the trial court, and thus the points were raised "in an appropriate manner." HRS § 641-2. In this case, the non-delegation and separation of powers doctrines were raised in the Fifth Circuit trial court, were argued again before the ICA, and thus are reviewable in this Court.

II. The "Pending Enactment of S.B. 3089" Does Not Affect The Interpretation Of Chapter 127A In This Litigation.

Grasping at straws, Respondents urge: "[T]his Court's review is especially unwarranted at this time in light of pending amendments to HRS § 127A-14 that will ensure that the statutory interpretation controversy at the center of this case... will not recur." Resp. at 2. No citation to authority appears holding this Court should ever consider "pending amendments" to a statute as warranting this Court's refusal to review and decide a question of statutory interpretation. Here, the Governor deployed the existing statute in an unconstitutional manner. The extent of the Governor's discretionary power is a matter of statewide importance and should be adjudicated, not sidestepped. S.B. 3089, *A Bill for an Act Relating to Emergency Management*, did not exist when this lawsuit proceeded through litigation and does not affect the analysis of the misuse of Chap. 127A powers.[1]

[1] Precedents in Hawai'i courts recognize that subsequent legislative actions can be cited *only* when they *confirm* this Court's interpretation of a statute. *State v. Dudoit*, 90 Hawai'i 262, 268 n.3, 978 P.2d 700 (1999) ("This court employs subsequent legislative history only to confirm its

Respondents next engage a position both undefended and self-contradictory where they assert: "Here, the delegation of emergency powers [by HRS § 127A-14] to the Governor comports with constitutional requirements because, among other things, the Legislature has provided meaningful guideposts regarding how the powers should be exercised and the Legislature has retained important checks on executive power." Resp. at 8.

First, for any such "meaningful guideposts regarding how the powers should be exercised," Respondents cite nothing at all, so their argument is effectively waived. *See Norton v. Admin. Dir. of the Court*, 80 Haw. 197, 200 & n.4, 908 P.2d 545 (1995); *United States v. Ghanem*, 993 F.3d 1113, 1133 (9th Cir. 2021).

Second, Respondents herald S.B. 3089 as though it would "confirm[] that the Governor has the clear statutory authority to 'redeclare the existence of a state of emergency' and 'extend' a state of emergency when necessary," *i.e.*, whenever the Governor personally decides. Resp. at 11 & n.10. Any supposed "meaningful guideposts" are entirely absent: Respondents instead enthusiastically assert the bill will confirm the Governor's having practically unlimited authority to command vast portions of the businesses, property, and lives of the residents of Hawai'i – with neither a time limit nor any meaningful legislative participation or oversight.

Third, Respondents assert:

> S.B. 3089 also adds a provision to chapter 127A indicating that "[t]he legislature may, by an affirmative vote of two-thirds of the members to which each house is entitled, terminate a state of emergency, in part or in whole, declared by the governor pursuant to this section." This further demonstrates the absence of any separation-of powers violation in chapter 127A, as it highlights the Legislature's clear retention of checks on executive power exercised under chapter 127A.

Resp. at 11.

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interpretation of an earlier statutory provision"), *cited by State v. Dunbar*, 139 Haw. 9, 20, 383 P.3d 112 (App. 2016).

The quoted S.B. 3089 language does *not* show any "clear retention of checks on executive power." When enacted, the bill would give the Legislature a veto over only the "state of emergency" declaration – not over any part of the Governor's actual implementation via statewide, massive, and arguably draconian edicts and mandates.

Moreover, that new statutory veto power would provide only a tantalizing sound-bite of legislative restraint. Imposing a *both houses two-thirds majority vote* hurdle is a sure way to delay and heavily restrain the Legislature from any practical "check" on executive power. It is notoriously difficult to surmount two-thirds majority voting hurdles. *See Gordon v. Lance,* 403 U.S. 1, 5-6, 91 S. Ct. 1889 (1971) (noting 2/3 majority vote rule renders political decision-making "more difficult"); *Huntington Park Redevelopment Agency v. Martin*, 38 Cal. 3d 100, 105, 695 P.2d 220 (1985) (noting voters thwarted by 2/3 vote hurdle); *Guinn v. Legislature of Nev.*, 119 Nev. 460, 471, 76 P.3d 22 (2003) (observing the "supermajority requirement was intended to make it more difficult" to get approval of measures); Julian Nyarko, *Giving the Treaty a Purpose: Comparing the Durability of Treaties and Executive Agreements*, 113 Am. J. Intl. L. 54, 63 (2019) (describing "the *high legislative hurdles …* to secure *a two-thirds majority,*" which require "a substantial political struggle" (emphasis added)).[2] S.B. 3089's two-thirds majority vote requirement effectively insulates the Governor's broad statewide micro-management from review by the Legislature, the voice of the people.

[2] "[Decision] costs will increase as the size of the group required to agree increases. As a collective decision-making rule is changed to include a larger and larger proportion of the total group, these costs may *increase at an increasing rate*." James M. Buchanan & Gordon Tullock, *The Calculus of Consent* 68 (Ann Arbor paperback ed. 1965) (emphasis added). The two-thirds majority vote rule necessarily multiplies the harmed citizens' costs of challenging a Governor's unilateral, personal discretionary, rule-by-edict.

And worse: "Certainly any departure from strict majority rule gives *disproportionate power to the minority*." *Gordon*, 403 U.S. at 6 (emphasis added). *S.B. 3089 thus empowers the minority of one person, the Governor.*

Apparently unconscious of the obvious self-contradiction, Respondents assert S.B. 3089 somehow "highlights the Legislature's clear retention of checks on executive power exercised under chapter 127A." Resp. at 11. *What "retention of checks"?* There are no legislative checks on the Chapter 127A executive power currently (except the 60-day statutory time limit the Respondents consider hortatory). S.B. 3089 would add a difficult, expensive, and impractical check (the 2/3 vote legislative veto) that previously did not exist. There is no *retention* of a check; there is an addition of a politically dubious, hypothetical check.[3] By pressing an argument this fast and loose, Respondents reveal a cynical disregard of the dangers of unchecked one-person rule of entire states.

CONCLUSION

Petitioners respectfully request this Court grant their Application and reverse the ICA and Fifth Circuit courts' decisions dismissing Petitioners' claims, as those decisions constituted "grave errors of law" in their refusal to recognize the express HRS § 127A-14 60-day limit on the Governor's otherwise unchecked unilateral control over the entire State of Hawai‘i. HRS § 602-59(b).

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[3] The new "check" *blocks legislative action* to moderate or rein-in the Governor's unilateral rule just as effectively as the Hawai‘i Constitution's two-thirds legislature vote requirement blocks disposal of nuclear waste in the state. *See* HRS Const. art. XI, § 8.

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CERTIFICATE OF SERVICE

I certify that the above document and exhibits were served electronically through the Court's JEFS system upon the following on the 31st day of May, 2022:

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